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July 7, 2004

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Finance Docket No. 34514
Raritan Central Railway, L.L.C. -- Operation
Exemption -- Heller Industrial Parks, Inc.

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of "Petition to Revoke Exemption," which is being filed jointly by Consolidated Rail Corporation (Conrail), Norfolk Southern Railway Company (NS), and CSX Transportation, Inc. (CSXT). Please date-stamp the extra copy that is enclosed and return it to our representative. Also enclosed is a diskette containing the Petition in Word format.

Respectfully submitted,

Robert M. Jenkins III

RMJ/bs

Enclosures
cc: John D. Heffner
Jonathan M. Broder
John V. Edwards
Paul R. Hitchcock

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34514

RARITAN CENTRAL RAILWAY, L.L.C.
-- OPERATION EXEMPTION --
HELLER INDUSTRIAL PARKS, INC.

EXPEDITED ACTION REQUESTED

PETITION TO REVOKE EXEMPTION

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Dated: July 7, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34514

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PETITION TO REVOKE EXEMPTION

Pursuant to 49 U.S.C. § 10502(d), Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) (collectively, "Petitioners") hereby petition the Board to institute proceedings to revoke the exemption granted to Raritan Central Railway L.L.C. (Raritan), effective June 25, 2004, to conduct regulated common carrier operations on track owned by Heller Industrial Parks, Inc. (Heller Parks), in Edison Township, New Jersey. *See Raritan Central Railway L.L.C. – Operation Exemption – Heller Industrial Parks, Inc.,* STB Finance Docket No. 34514 (served June 25, 2004) (June 25 Decision). This case raises substantial factual and legal issues that merit a "more searching process" – whether a petition for an individual exemption under 49 CFR § 1121 or a full application under 49 CFR §1150 – than is possible in a 7-day notice proceeding under 49 CFR § 1150.41. *See Jefferson Terminal R.R. Co. – Acquisition and Operation Exemption – Crown Enterprises, Inc.,* STB Finance Docket No. 33950 (served March 19, 2001), slip op. at 5.

Discussion

Pursuant to 49 U.S.C. § 10502(d), "[t]he Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title." Section 10101 charges the Board with implementation of the Rail Transportation Policy of the United States Government, which includes:

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; . . . (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense; (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes; [and] (12) to prohibit predatory pricing and practices, to avoid undue concentration of market power, and to prohibit unlawful discrimination . . . .

Petitioners' position here is that the decision whether Raritan should operate in Heller Industrial Park (the "Park") as a contract switcher or as a common carrier implicates all of the above policies and requires the kind of careful analysis, on a complete record, that is only possible in an application or individual exemption proceeding.

For decades, the Board and its predecessor, the Interstate Commerce Commission, have stressed the importance of minimizing the extent to which transactions subject to its jurisdiction could result in the creation of bottleneck common carriers. This mandate has been emphasized not only in the context of control transactions under 49 U.S.C. § 11323 and its predecessors, *see, e.g., Burlington Northern, et al. – Merger – Santa Fe Pacific, et al.,* 10 I.C.C.2d 661, 725-28 (1995), but also in other contexts across the spectrum of the Board's regulatory responsibilities. For example, in the abandonment context, the Board has stated:

> The burden to show that the Board should extinguish competition where it already exists is a difficult one to meet because the Board is guided by its governing statutes and policies, which make competition important. In particular, the RTP emphasizes the role of competition, at 49 U.S.C. 10101(1), (4), and (5). Thus, the Board and its predecessor the Interstate Commerce Commission (ICC), have always been particularly vigilant to protect existing competition produced by market forces. For example, in the rail merger context, which is where the issue usually arises, the Board and the ICC have consistently sought to assure that agency-approved transactions would not result in the creation of "2-to-1" points where shippers lose existing intramodal rail competition. *See, e.g., Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 252, 390-93 (1996).

Waterloo Railway Co. – Adverse Abandonment – Lines of Bangor and Aroostook R.R. Co. and Van Buren Bridge Co. in Aroostook County, ME, STB Docket No. AB-124 (Sub-No. 2) (served May 3, 2004) (*"Waterloo"*), slip op at 5-6 ("Because of the strong statutory and Board policies favoring the preservation of rail-to-rail competition and the provision of adequate service for shippers, the Board will not deprive Fraser of the availability of rail service options that it already has absent a very strong showing that such action is in the public interest.") Because Raritan's proposed common carrier operation would substitute bottleneck single-line service for the non-discriminatory competitive direct access available to shippers using the Park today, the Board should not, consistent with its statutory mandate, sanction common carrier status for Raritan's operation without full consideration of the public interest.

At the outset, Petitioners wish to stress that the issues that Petitioners ask the Board to address here on a more complete record do ***not*** include (1) whether Heller Parks has the right to terminate its agreement with Conrail or (2) whether Heller Parks is free to contract with Raritan or any other qualified operator to provide pickup or delivery service. Petitioners concede that Heller Parks had the right to terminate its agreement with Conrail and contract for Raritan to provide switching services on Heller Parks' property. Petitioners did raise the issue in their

Petition to Stay of whether Heller Parks could lawfully contract with Raritan to provide ***exclusive*** service to shippers using the Park, so as to effectively evict Conrail from the Park on August 15. June 25 Decision at 4. In light of the Board's denial of the Petition to Stay, and in order to focus this revocation proceeding on the issues of greatest concern, Petitioners intend to cooperate both with Heller Parks' request that Conrail vacate Heller Parks' tracks effective August 15 and with Raritan's request that Conrail work with Raritan to establish an interchange point for that traffic. Petitioners will not object to Raritan operating as a contract switcher within the Park.

Raritan, however, wants more than to provide contract switching services in the Park. Raritan wants instead to be treated as a common carrier that could set its own rates to any shipper moving traffic through Heller Park, that could differentially price different movements, and that could hold economic and operating control of the origination and termination of every carload of traffic. Today, shippers having a choice of through service by NS or CSXT, with Conrail providing neutral switching services. *See CSX Corp., et al. – Control and Operating Leases/Exemptions – Conrail Inc., et. al.,* 3 S.T.B. 196, 228, 247-48 (1998) (*Decision No. 89*) (approving plan for CSXT and NS each to have independent authority to serve shippers in the Shared Asset Areas and endorsing the "head-to-head two railroad competition" that would be created). If Raritan provides contract switching services for Heller Parks, shippers moving traffic to and from the Park will continue to have direct two-carrier competitive rail service. If, however, Raritan is given common carrier authority, the Park will become a "2-to-1" point, and the competitive access that shippers have now would be eliminated. Raritan will have the ability

to dictate prices for through movements regardless of the route taken to or from the Park.[1] Particularly given the importance placed by the Board in *Decision No. 89* on the creation and maintenance of two-railroad competition in the Shared Asset Areas, as well as the Board's and the ICC's historic emphasis on the maintenance of competitive access to points that already enjoy such access, Petitioners submit that the Board should not approve Raritan's request that its operations be treated as jurisdictional common carrier operations without the kind of factual record and deliberative investigation of the issues that is only possible in an application or individual exemption proceeding.

Even without the added import of *Decision No. 89,* and the Board's and the ICC's historic concerns over 2-to-1 transactions, revocation of Raritan's exemption would be fully justified here. For many years, the answer to the question of whether the track used by a railroad is "jurisdictional" track, over which the Board has licensing authority under 49 U.S.C. §§ 10901(a) or 10902(a), has turned principally on the specific use to which the track is put. *See, e.g., Texas & P. Ry. v. Gulf, Colo. & S.F. Ry.,* 270 U.S. 266, 274-79 (1926) ("industrial" track used in line-haul transportation held to require ICC approval); *New Orleans Terminal Co. v. Spencer,* 366 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied,* 386 U.S. 942 (1967) ("side" track used for through service held to require ICC approval); *Nicholson v. ICC,* 711 F.2d 364 (D.C. Cir. 1983) (yard track used for "switching" and "classification" operations held not to require ICC approval); *Brotherhood of Locomotive Engineers v. United States,* 101 F.3d 718, 728-731 (D.C. Cir. 1996) (main line track used for "switching" held not to require ICC/STB approval). A

[1] And Raritan has made clear that it intends to wield that power. In an e-mail to NS dated June 18, 2004, the President of Raritan, Eyal Shapira, wrote: "I have authorized my lawyer to spent as much money as needed on the Heller Park case. At any rate, whatever is the outcome, ***NS business to RCRY and Heller Park will be moving inbound with large premium or not at all.***" [emphasis added] *See* "Supplemental Statement of Norfolk Southern Railway Company in Support of Petition to Stay Exemption," filed in Docket No. 34514 on June 21, 2004.

track's status can be different for different railroads, depending upon the different uses to which they put the track. *Brotherhood of Locomotive Engineers,* 101 F.3d at 727.

Recently, the STB has also held that track used for "switching" may nevertheless be subject to the STB's licensing authority where "the operations at issue would constitute the carrier's entire line of railroad" and "the larger purpose and effect of [the transaction] . . . is to create a new common carrier by rail." *Texas Central Business Lines Corp. – Operation Exemption – MidTexas International Center,* STB Finance Docket No. 33997 (STB served Sept. 17, 2002), slip op. at 2, *citing Effingham R.R. Co. – Petition for Declaratory Order – Construction at Effingham, IL,* 2 S.T.B. 606 (1997), *aff'd sub nom. United Transportation Union v. STB,* 183 F.3d 606, 613 (7th Cir. 1999). Thus, according to the STB, it is not only the use to which the railroad puts the line, but also whether the railroad's operations constitute the entirety of its operations, that determines whether the track is "jurisdictional" for purposes of applying the Board's licensing authority under Sections 10901(a) and 10902(a).

Neither of those criteria would appear to distinguish Raritan's proposed operations in Heller Park from Conrail's operations. However, the 7-day notice process used by Raritan under 49 C.F.R. § 1150.41 provides no opportunity to apply the legal criteria to the relevant facts. In its June 25 Decision denying Petitioners' motion to stay the exemption granted to Raritan, the Board cited *Yolo Shortline Railroad Company – Lease and Operation Exemption – Port of Sacramento,* STB Finance Docket No. 34114 (STB served Feb. 3, 2003), slip op. at 4. n.9, for the proposition that "track may have different regulatory status for different users." June 25 Decision at 4. But *Yolo* simply cross-referenced the Board's earlier recitation in a related case of the well-established proposition that a track's status may be different for different users, "based on each carrier's use and operations over the track." *Union Pacific Railroad Co. – Operation*

Exemption – In Yolo County, CA, STB Finance Docket No. 34252 (served Dec. 5, 2002), slip op. at 3 n.8 (*citing Brotherhood of Locomotive Engineers,* 101 F.3d at 727) (*"Yolo County"*). There is no evidence in this case that Raritan's operations in Heller Park will be any different than Conrail's operations. *Cf. Yolo County,* slip op at 4 (distinguishing cases where short-line railroad's use of track would be substantially different from large railroad's). As far as can be told from either Raritan's exemption notice or its reply to Petitioners' stay request, Raritan will be performing the same switching function for the same shippers that Conrail performs today. Petitioners believe that discovery is necessary to establish the facts in this regard, but at this point the Board can only proceed on the assumption that the "use" test provides no basis for treating Raritan's regulatory status any differently than Conrail's.

Nor does the STB's more recent "entire line of railroad" test provide a basis for distinguishing Raritan's regulatory status from Conrail's. Raritan is not a non-carrier, and the "larger purpose and effect" of this transaction is not "to create a new common carrier by rail." *Texas Central, supra.* Raritan is an established carrier with existing operations a few miles away, at Raritan Industrial Center. Raritan's operations at Heller Park, however, will have nothing to do with its operations at Raritan Industrial Center. As far as can be told from Raritan's exemption petition, Raritan will simply be switching cars that will be carried in line-haul service by CSXT or NS. If those operations are not "jurisdictional" for Conrail, then there is no basis on the record thus far for determining that they are "jurisdictional" for Raritan.[2]

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[2] Merely running a disconnected switching service in an industrial park or on shipper track, combined with a claim that anyone locating in that park will be served, is not sufficient to make those operations line-haul common-carrier operations. Were that enough to make the track jurisdictional, then every multi-shipper contract switching operation in the country would be jurisdictional, and every such contract switcher would be required to obtain authorization from the Board to either initiate or terminate service. *See Chevron USA, Inc. – Lease and Operation Exemption – Richmond Belt Ry.,* ICC Finance Docket No. 32352 (served May 25, 1995)

(cont'd)

These issues take on added importance in the context of the Board-approved operations of Conrail, CSXT, and NS in the Shared Asset Areas. The Board emphasized in *Decision No. 89* that "Conrail was a 'bottleneck' carrier for most through shipments moving to or from this area. Now, CSX[T] and NS will directly compete with each other in important markets where Conrail did not compete with other major railroads before." 3 S.T.B. at 247. It is not necessary for Conrail, CSXT, or NS to operate inside industrial parks for CSXT and NS to compete head-to-head for rail traffic moving though those parks. If the park owners or shippers wish to provide their own pickup and delivery service on their own tracks, contract switchers can provide that service for the parker owners or switchers without affecting CSXT's or NS's ability "to establish all rates, charges, service terms, routes, and divisions, and to collect all freight revenues, relating to freight traffic transported for its account within the SAAs." *Id.* at 228. However, if the Board deems the track involved "jurisdictional" for a switching operation, and grants common carrier status to the operator involved, that carrier becomes the originating or terminating carrier for every movement through the industrial park. If it has exclusive operating rights, as Raritan asserts it does here, then the effect of granting it common carrier status is to create a "bottleneck" carrier where none existed before.[3]

(... cont'd)

(shipper's lease of 6-mile railroad belt line and yards, and use of railroad services contractor to operate the belt line, which served three shippers altogether, not subject to ICC licensing authority). Further, this does not distinguish Raritan's proposed operation from those of Conrail, NS, or CSXT.

[3] In its June 25 Decision, the Board noted "that Conrail, CSXT, and NS will continue to have a role in providing service to shippers that are located within the Heller Industrial Park whether or not they provide direct service to those shippers." Slip op. at 4. But that role is very different where an industrial park or shipper employs a contract switcher (or uses its own employees to perform switching operations) than when a common carrier is involved. A common carrier is a participant in the through movement. A common carrier can set its own rates and demand its

(cont'd)

Significantly, since Petitioners are ***not*** contesting Heller Parks' right to contract with Raritan to provide pickup and delivery service on Heller Parks' track, there is no issue here of depriving Heller Parks or any shipper of Raritan's service.[4] The only issue is whether Raritan should operate as a common carrier or as a contract carrier. A proceeding that allows for the development of a more extensive record and full argument on this important issue is vital, particularly in light of "the strong statutory and Board policies favoring rail-to-rail competition." *Waterloo, supra,* slip op. at 6.

(... cont'd)

own division of the revenues from a through movement. 49 U.S.C. § 10701. A common carrier with exclusive access to a shipper can claim the "lump" of revenues that the Board has long recognized is available to a railroad that provides the sole rail access at either the origin or the destination of a movement. *Burlington Northern, et al. – Merger – Santa Fe Pacific, et al.,* 10 I.C.C.2d at 748-53. Thus, the fact that Conrail, CSXT, and NS may still be able to "have a role in providing service" does not mean that the rail transportation customer will remain in the same competitive circumstances that it was in prior to the transaction. It clearly will not. Furthermore, if Heller Parks determines to terminate its contract with Raritan, it cannot force Raritan off the track. Absent Raritan's voluntary departure, or an "adverse abandonment" order from the Board, Raritan will be entitled to continue operations in the Park indefinitely. *See Thompson v. Texas Mexican Ry.,* 328 U.S. 134 (1946).

[4] The Board in its June 25 Decision suggested that there were shippers "that would apparently prefer Raritan's service over the service of petitioners." June 25 Decision at 4. Apparently, the Board's comment was based upon the statement of Superior Warehousing Systems, Inc. (Superior), which characterized itself as a "customer of Conrail." *See* "Reply of Raritan Central Railway, L.L.C. to Petition for Stay," Exh. B at 1, filed June 24, 2004, in Docket No. 34514. Since Petitioners are not contesting Raritan's right to operate as a contract carrier at Heller Industrial Parks, we will not engage in a point-by-point rebuttal of Superior's assertions. If Superior prefers Raritan's service, Raritan can certainly provide it as a contract carrier. We should note, however, that it is our understanding that Superior Warehouse is not a rail transportation customer. It is a warehouse through which rail transportation customers send their products. Superior Warehouse generally is not responsible for negotiating or paying for the cost of rail transportation. It is the actual rail transportation customers that do that and that will be most affected.

Conclusion

Petitioners are not asking the Board immediately to determine whether to revoke Raritan's exemption. Instead, Petitioners ask the Board to open a proceeding to examine the several public policy and factual issues outlined herein, in addition to others that will be developed further in discovery. We believe that discovery is required to develop an adequate record on which to base a revocation decision. Accordingly, Petitioners propose a deadline for discovery requests in this matter of July 22, 2004. Petitioners would file their opening statement of facts and argument by August 6, 2004. Responses would be due by September 6, and Petitioners' reply would be due by September 20.

Respectfully submitted,

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Dated: July 7, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Petition to Revoke Exemption" have been served this 7th day of July 2004, by fax or first-class mail, upon the following persons:

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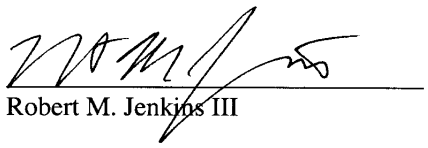

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